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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1335

GARY TYLER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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I.

STATEMENT OF THE CASE

On or about Friday evening, October 4, 1974, racial hostilities were evidenced at a Destrehan High School football game. When classes resumed on Monday morning, October 7, 1974, Destrehan High School, which is located in St. Charles Parish in or near Destrehan, Louisiana, was still feeling the effects of the racial hostilities. After a morning of general turmoil, fighting, stabbing, and other violence, school officials decided to close school early and send all students home. School buses were called out and were loading kids on a general direction basis by early afternoon.

In the meantime, defendant was suspended from school early that same morning about 8:30 to 9:00 A.M. He was seen about one hour later on the levee near the school. He then went home and to some other places which were en route to or near his home, and later on the road going back to the school, along with a companion, was picked up by Deputy V. J. St. Pierre, who, believing them to be truants described in a police call, drove them to Destrehan High School for identification as to the truancy. Upon arriving at the school, they encountered the trouble. Verifying defendant's suspension, St. Pierre told defendant to go home immediately. Defendant then went to the area where the school buses were loading and, along with more than a full busload of other black students from the St. Rose, Louisiana, area, got aboard bus number 91.

The buses, after loading on the school grounds, had to pass groups of white students gathered closely together along the school driveway near the edge of the school grounds and along the edge of the street leading into the driveway of the school grounds. Some of those near the street included parents and relatives who, hearing about the troubles at school, came to pick up certain students to take them home. Among those in one cluster or group of not less than ten people standing very closely together, some one behind the other, on the driveway of the Duhe home, immediately off the school grounds along the street running into the school, were little Timothy Weber, a freshman high school student, his mother, and behind Timmie Weber, Roland LaBranche. This cluster or crowd of not less than ten were part of an

overall crowd of more than 100 up to 200 stretching across a larger area and contiguous therewith.

As a school bus ahead of bus 91 and full of black students passed the white crowd, a wine bottle was thrown from the bus into the white crowd. As the next bus passed, a container of powder was thrown from the bus into the crowd, and some of the crowd tried to throw it back at the bus. Jeering and shouting was taking place, but not from the cluster of those on the Duhe driveway. As bus 91 came past the large crowd, there was jeering and shouting on the part of white students in the crowd and on the part of black students in the bus. Two or three handfuls of rocks and shells were thrown toward the bus. Then, as the right rear side of the bus passed adjacent to the Duhe driveway, two hands sticking out of the third-to-last right side window of the bus and holding a gun, fired a shot point blank into the cluster or crowd of people, the edge of the crowd being about six feet or so from the bus, on the Duhe driveway. The hands and gun went immediately back into that bus window but blue smoke could still be seen hovering upwards therefrom. The bullet from the shot traversed the head and neck area of Timmie Weber, felling him and killing him, while he was waiting with his mother for the bus to pass so they could cross the street, get into their car, and go home. That same bullet, after exiting Timmie Weber, struck Roland LaBranche, who was standing right behind Timmie Weber, in the arm, causing a flesh wound thereto.

From the vantage point of state's evidence from inside the bus it is learned that as the bus drove past the

large crowd of whites, black students on the bus, enough to fill up the seats and have several standing in the aisle, were jumping and shifting around to get at windows to jeer and shout back at those white students who were jeering and shouting at the bus. Some rocks and shells thrown by some in the crowd sprinkled the bus. More students on the bus jumped and shifted around. At this point, Natalie Blanks, a black student on the bus, saw defendant, with gun, open the bus window, position himself on the seat with one knee on the seat and the other foot on the floor, put his hands holding the gun outside of the window and fire the gun into the crowd. Larry Dabney heard the sound of the gunshot, immediately turned his head, and saw the gun in defendant's hand "right after" (Tr., pp. 1062-1063) he heard the gunshot. Defendant then tried to pass the gun off to other students, but the gun, after it seems to have passed around somewhat, was returned to defendant. Defendant then gave the gun to Loretta London Thomas for her to hide it, she gave the gun back to defendant. Natalie Blanks then saw defendant slice the bus seat and hide the gun in the bus seat itself.

Immediately after the gunshot, the bus came to a stop and was surrounded by several sheriff's deputies already on the scene of the school troubles. They moved the bus around the corner, away from the crowd, and unloaded the students, one by one, onto a vacant lot. The male students were "frisked" as they came off the bus, but the girls were not seriously searched. Deputies kept the group of students from the bus together in a physically circumscribed area on the vacant lot. The students were photographed, and at least one picture shows de-

fendant with his gloves. Deputies made what law enforcement officers consider to be a not-thorough search of the bus, consisting primarily of looking under the seats. Even so, several riot weapons and a fired .45 calibre shell casing was found.

While on the vacant lot, defendant attempted four separate times to stalk away from the circumscribed area and escape from the group of suspect students. Deputy Nelson Coleman stopped him each time. On the fourth time of attempting to escape and also apparently because defendant started to interfere with the questioning of another student, defendant was arrested for resisting an officer.

The students were loaded back onto the bus, except for defendant and one other student arrested, and the bus was taken to a sheriff substation where a more thorough search could be made of the students and the bus and where the students could be questioned. Defendant and the other student arrested were taken to the substation in police cars in a motorcade including the bus. All bus windows had been closed, and at all times the bus was carefully watched by deputies to make sure nothing was thrown out.

At the substation, defendant sat in the police car for some time, was allowed to talk to his mother, and was allowed to give his gloves to his mother who took them home. Later when Natalie Blanks' account of the shooting was made known to the deputy involved in defendant's resisting an officer arrest, that deputy had defendant's mother return the same gloves, though upon return they were damp.

In the meantime at the substation, Natalie Blanks told, first the woman searching her and then, after her search, deputies, that she knew what had happened and then related her eyewitness account to them, including the hiding of the gun. Deputies went directly to the seat and recovered a .45 calibre bore firearm weapon which was later found to have been stolen from a gun store in a nearby community.

Meanwhile, back at the crime scene, after the bus departed the area and Timmie Weber was rushed to a hospital, where he died of the bullet wound, a crime scene search of the Duhe driveway recovered the bullet slug.

A criminalist expert in the fields of forensic chemistry and gunpowder identification found traces of gunpowder from scrapings of the web area of the gloves. And an expert in the field of firearms identification found that the spent casing found on the bus and the bullet found on the Duhe driveway were fired from the weapon found in the seat on the bus.

On the witness stand at trial, defendant admitted that the gloves were his.

Pursuant to a grand jury indictment charging defendant with first degree murder, he was tried and found guilty as charged by a unanimous jury of twelve.

Pending his appeal, defendant filed a second motion for new trial asserting newly discovered evidence. This evidence consisted of recantations of their trial testimony by Natalie Blanks and Loretta London Thomas and of other evidence, all of which tended to impeach the credibility of Natalie Blanks as a witness at trial. The

case was remanded to the lower court at the request of the state for a full evidenciary hearing on the allegations, and after the hearing, the trial judge overruled the motion for a new trial after making specific findings of fact, inter alia, that the newly discovered evidence was suspicious and non-credible.

On appeal to the Louisiana Supreme Court, the petitioner's conviction was affirmed on January 24, 1977; however, his sentence of death was annulled and set aside and the case was remanded to the district court with instructions to sentence the defendant to imprisonment at hard labor for life without eligibility for parole, probation or suspension of sentence for a period of twenty years based on the decision in *Roberts v. Louisiana*, 96 S. Ct. 3001 (1976). On February 25, 1977, his application for rehearing to the Louisiana Supreme Court was refused.

II.

Petitioner's sole question presented to this Honorable Court is the constitutionality vel non of the life sentence imposed by the Louisiana Supreme Court after the death penalty in Louisiana was struck down in *Roberts v. Louisiana*, supra. This issue was argued before the Louisiana Supreme Court and after argument said Court requested supplemental briefs from both counsel which were filed.

In disposing of petitioner's contentions, the Louisiana Supreme Court stated:

> "Invalidation of the death sentence by the *Roberts* decision has the effect, defendant contends, of re-

moving the crime of first degree murder from its classification as a 'capital offense', one that may be punishable by death. Thus, the argument proceeds, the Constitution of 1921, in effect on October 7, 1974 (the date of this offense) does not confer jurisdiction on the district court in a noncapital case where a juvenile is involved. Jurisdiction over juveniles is only conferred on the district court 'for capital crimes and crimes defined by any law defining attempted aggravated rape if committed by children fifteen years of age or older'. La. Const. art. VII, §52 (1921).[1] See La. Const. art. VII, §35 (1921).

When the same issue was raised recently in *State v. Smith*, we held:

'Defendant maintains that when the death penalty was declared unconstitutional, first degree murder lost its status as a capital crime, and he should have been remanded to the custody of the juvenile court. (Cf. La. C. Cr. P. art. 933 (2): " 'Capital offense' means an offense that may be punished by death"). The identical issue was raised after Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), struck down the death penalty provision of our prior first degree murder statute, La. R.S. 14:30 (1950). State v. Whatley, 320 So. 2d 123 (La. 1975). Whatley held that the district court retained jurisdiction over a juvenile charged with first degree murder because "as enacted, La. R.S. 14:30 (1950) constituted a legislative classification that the crime of murder constituted a capital offense, and that conduct punishable by this statute remained a 'capital' crime for purposes of Louisiana law (even though Furman held that the death sentence could not actually be imposed or executed." 320 So. 2d at 125. Defendant was charged, tried and convicted for an offense which the legislature classified as "capital," and *Roberts* has no bearing upon the jurisdiction of the district court in this matter.'

That holding was considered dispositive of a similar issue raised in State v. Moore, —So. 2d—, Nos. 58,446, 58,485 and 58,588 decided December 14, 1976. See also State v. Whatley, 320 So. 2d 123 (La. 1975).

By the view we have taken of the issues presented in the motion to discharge if this conviction is affirmed, the final contention that the juvenile court may not exercise jurisdiction over the defendant is rendered moot. This is so because if defendant's conviction is affirmed he will not be tried again, only resentenced in the court of his conviction."

On this issue attached hereto is a copy of the State's Supplemental Brief which was filed with the Louisiana Supreme Court.

III.

CONCLUSION

The Petition for Writ of Certiorari should be denied in this case because petitioner has failed to show that any Constitutional or legal right to which he is entitled has been abridged by any State statute or action. 28 USCA §1257 (3).

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Petition for Writ of Certiorari has been served on the Petitioner by placing copies of same in the United States mail, postage prepaid, addressed to:

Honorable Jack Peebles
Attorney for Petitioner
Suite 1006 Baronne Building
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New Orleans, Louisiana 70112

This 12 day of April, 1977.

SUPREME COURT OF LOUISIANA

Number 57,703

STATE OF LOUISIANA,

Appellee,

v.

GARY TYLER,

Appellant.

APPEAL FROM THE 29TH JUDICIAL DISTRICT COURT, PARISH OF ST. CHARLES, RUCHE J. MARINO, DISTRICT JUDGE

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF LOUISIANA, APPELLEE

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SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF LOUISIANA, APPELLEE

ARGUMENT

May it Please the Court:

I. Introduction

Argument in this appeal took place on November 10, 1976. Prior to oral argument, both appellant and appellee timely filed fairly exhaustive briefs on the six assignments of error urged by appellant on this appeal and on appellant's Motion to Be Discharged From Custody. During oral argument some confusion was expressed as to appellant's motion and as to the resolution of the issues contained therein by the case of *State v. Smith*, Docket Number 58,170, decided Monday, November 8,

1976. This Honorable Court requested Supplemental Briefs on these issues.

Because the oral argument, at least of appellee, ran short of time before fully explaining some recent developments in the law applicable to appellant's assignment of Error Number 2, this Supplemental Brief will also very briefly call this Honorable Court's attention to same.

This Supplemental Brief in no way waives or abandons any of appellee's arguments in its Original Brief but merely supplements those arguments as explained herein.

II. Supplemental Reply to Specification Number 1 and Defendant's Motion to be Discharged from Custody

In his Motion To Be Discharged From Custody, particularly as explained by appellant's counsel at oral argument, defendant-appellant essentially urges that although the criminal district court had jurisdiction to try defendant for the capital crime of first degree murder and the conviction be sustained on appeal, the criminal district court has no jurisdiction to sentence defendant to any sentence less than death. He urges that even though the conviction be upheld, defendant should go scot-free.

The whole crux of defendant's argument lies in the apparent lack of statutory authority providing expressly and distinctly for any alternative sentence to death for the commission of first degree murder. From that cru-

cial premise he argues that the sentence for second degree murder cannot be given to defendant because he was a juvenile at the time of the offense and because criminal district courts lacked jurisdiction to try juveniles for second degree murder. He also argues that defendant cannot be tried by juvenile court because he stands already convicted of first degree murder for the same act or transaction for which he would be tried in juvenile court.

That the crux of defendant's argument lies in the apparent lack of statutory authority providing expressly and distinctly for any alternative sentence to death for the commission of first degree murder is supported expressly by defendant's motion. It states, at page 2 of defendant's Motion,

> "The new statute under which Mover was convicted and sentenced provides no such alternative to the death penalty" (as had C.Cr.P. Art. 817 previously),

and again at page 3 of defendant's Motion,

> "This Court did not state the rationale for allowing this resentencing procedure in those cases, but it appears that the Court could only justify imposing the sentence of life imprisonment by tacity invoking the alternative qualifying verdict provided by Code of Criminal Procedure, Article 817, *supra*.
>
> * * *
>
> . . . the death penalty is the sole available sentence for an offender convicted of First Degree Murder. There is no alternative sentence provided by the Statute."

Defendant, identically, contends in his Motion as to all defendants, juvenile and otherwise, at page 4 thereof,

> "In *Shaffer* (257 So.2d 121), this court upheld the conviction but remanded for resentencing. This policy was continued after the Supreme Court's decision in *Furman, supra*. It appears logical that *Shaffer* dictates that now, after *Roberts, supra*, this court should now uphold the conviction for First Degree Murder while acknowledging that no penalty can be imposed."

State-appellee believes these arguments of defendant to be thoroughly unsound and to have arisen from defendant's misreading entirely of the rationale of the majority in *Shaffer* expressed by Mr. Justice Barham. The majority in *Shaffer* not only used another theory altogether in arriving at life sentences to replace the death penalties vacated as a result of the U.S. Supreme Court decisions but, in addition, expressly rejected the theory that the Court could grant such sentences on the authority of C.Cr.P. Art. 817. The majority in *Shaffer* said,

> "Our Criminal Code provides that a conviction for murder (R.S. 14:30), aggravated rape (R.S. 14:42), or aggravated kidnapping (R.S. 14:44) carries a mandatory death penalty. Our Code of Criminal Procedure, however, modifies this provision by stating in Article 817: 'In a capital case the jury may qualify its verdict of guilty with the addition of the words "without capital punishment," in which case the punishment shall be imprisonment at hard labor for life. * * *' *Thus in a capital case it is the jury, not the judge, that metes out the punishment upon conviction, that prescribes the sentence. Therefore our law authorized neither this court nor the trial judge to qualify the guilty verdict by imposing upon the defendants here sentences of life imprisonment.*" (Emphasis added.) 257 So.2d at 132.

After expressly rejecting the argument that the Court had the power to impose life sentences in lieu of invalid death penalties on the grounds that C.Cr.P. Art. 817 provided for life sentences as alternate sentences (imposable only by a jury, not by a court), the majority in *Shaffer* then faced squarely the problem before it: How should defendants duly convicted of capital crimes be sentenced, when the only sentence which could be imposed upon them in accordance with Louisiana law (the death penalty) was invalid because of U.S. Supreme Court interpretations of the U.S. Constitution?

The Court then proceeded to resolve that problem by applying C.Cr.P. Art. 3 and *State v. Rideau*, 246 La. 451, 165 So.2d 282 (1964) and under *that authority* adapting Louisiana's criminal procedure, "even in the face of contrary statutes" (257 So.2d at 132)—including C.Cr.P. Art. 817, which had just before therein been expressly rejected as a "contrary" statute—"in order to meet new constitutional standards as announced by the United States Supreme Court." (257 So.2d at 132) The imposing of life sentences in *Shaffer* and in all similar cases after *Shaffer* was by way of a *court-created procedure*, not any statutory authority specifically providing for sentences. The Court found the power to create such procedures on the authority and applicability of C.Cr.P. Art. 3 to situations wherein the only statutory provisions applicable had been held constitutionally infirm. The only criterion under C.Cr.P. Art. 3 the Court has in creating or fashioning procedures in such situations is that the Court should be *consistent with the spirit of codal, statutory, and constitutional provisions.*

Thus, in the aftermath of *F rman v. Georgia*, 408

U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), this Honorable Court followed the rationale of *Shaffer* in applying C.Cr.P. Art. 3 to create and fashion the same remedy as in *Shaffer*. See, for example, *State v. Franklin*, 263 La. 344, 268 So.2d 249 (1972). The imposing of life sentences in *Franklin* and other similar cases in the wake of *Furman* could *not* have been done on the authority of C.Cr.P. Art. 817 as providing for alternate life sentences for murder, because it was precisely the kind of statutory procedure of C.Cr.P. Art. 817—allowing juries unfettered discretion in imposing sentences of life or death—that was held constitutionally invalid in the *Furman* case. In other words, after *Furman*, C.Cr.P. Art. 817, as it read at that time with respect to a jury's qualifying a verdict "without capital punishment" and the effect thereof, was itself constitutionally invalid. Therefore, C.Cr.P. Art. 817 could not be used as valid authority to impose life sentences in post-*Furman* cases.

Once one sees falsity of defendant's premise that previous capital case dilemmas were resolved only because C.Cr.P. Art. 817 provided life imprisonment as an alternative to the death penalty, one readily sees how defendant's whole argument falls apart. Once it is seen that life imprisonment was actually imposed on the authority of C.Cr.P. Art. 3 and the *Rideau* case, supra, by a Court-created, Court-fashioned remedy, it is readily seen that the life sentences imposed in all such cases has thereby become *the* sentence for commission of the capital crime of which such defendants were convicted. The statute, the law, may not impose a life sentence, but the statutory sentence, being made non-imposable by U.S.

Supreme Court decisions, cannot then be imposed by Louisiana courts. In such cases, on the authority of C.Cr.P. Art. 3 and *Rideau*, the Court-fashioned remedy then actually provides the sentence for the capital crime in question. And that sentence then, until the Legislature enacts a new, constitutionally valid remedy, actually becomes the sentence for the capital crimes of which such defendants are convicted. That is the rationale of *Shaffer*, *Franklin*, and similar cases.

Thus, in *State v. Jenkins*, Docket Number 56,944, decided Thursday, October 14, 1976, this Honorable Court immediately went to the same rationale by implication.

> "This is not the first time that decisions of the United States Supreme Court have invalidated Louisiana provisions relative to capital punishment. In Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L. Ed.2d 776 (1968), and again in Furman v. Georgia, *supra*, Louisiana statutes were effectively invalidated. Each time this Court was called upon to resolve the question of sentencing defendants validly convicted, but unconstitutionally sentenced to death. In each case we instructed the trial courts to substitute life imprisonment for the death sentence. (Citing cases.)" Slip Opinion, p. 40.

Thus, this Honorable Court had little trouble in itself immediately fashioning a life imprisonment remedy. It is important to note that this Honorable Court did not jump straight to the penalty of second degree murder but proceeded directly to the life sentence in general. Only at that point, after "step one" as it were, did this Honorable Court address itself *by implication* to the criterion of C.Cr.P. Art. 3 that the Court-created proce-

dure must be consistent with the spirit of codal, statutory, and constitutional provisions. It did so by noting the anomaly that would exist between a mere life sentence, without more, for commission of first degree murder, a worse crime than second degree murder, and the more severe life sentence statutorily mandated for second degree murder. To be consistent with the spirit of these statutory provisions, this Honorable Court then decided that the Court-fashioned procedure should produce the same kind of sentence for first degree murder as then statutorily existed for second degree murder. But it cannot be over-emphasized here that the penalty fashioned by this Honorable Court in *Jenkins* was *not* the penalty for a second degree murder; rather, it was established as the penalty "to be imposed upon a valid conviction for first degree murder." *State v. Jenkins*, Slip Opinion, p. 41.

Defendant's arguments in his Motion To Be Discharged also falls because he apparently relies on the position that such life sentences imposed as in *Jenkins* are sentences for second degree murder, instead of for first degree murder. From that position he argues that defendant cannot receive such a sentence, because criminal district courts lacked jurisdiction over defendant for second degree murder. But as pointed out above and as pointed out in *Jenkins*, the life sentence imposed in *Jenkins* was for a valid conviction of first degree murder, not second degree murder. And criminal district courts have jurisdiction over defendant for first degree murder and, hence, have jurisdiction to impose the now Court-created *sentence for first degree murder*, which only coincidentally happens to be the same sentence as that

for second degree murder in order to prevent an anomalous situation and to be consistent with the spirit of statutory provisions.

If the theory were otherwise—that is, if the life sentences to be imposed according to *Jenkins* were for second degree murder as the next highest lesser-included offense and not for first degree murder—then that whole theory and all such sentences have very grave doubt as to their constitutional validity in light of the U.S. Supreme Court's disparaging remarks about Louisiana's lesser-included crimes system which operates procedurally "even if there is not a scintilla of evidence to support the lesser verdicts." *Roberts v. Louisiana*, 96 S.Ct. at 3007. To avoid the implications here, this Honorable Court ought to confirm that the life sentences to be imposed according to *Jenkins* are Court-created sentences for first degree murder and not for second degree murder, though the practical effect of the sentences themselves are coincidentally the same.

To establish the system defendant advocates in his Motion To Be Discharged—that is, that this Honorable Court hold as a matter of law that even though the first degree murder conviction should stand, defendant should go free without any sentence at all, because the court has no jurisdiction to sentence him—would be to mock the whole theory and system of criminal justice and to establish an absurd result. *Qui parcit nocentibus innocentes punit*. (He who spares the guilty punishes the innocent.) Jenkins' Eight Centuries of Reports, English Exchequer, p. 133. "A sentence *is* the penalty imposed by the court on a defendant . . . upon a verdict of

guilty. . . ." (Emphasis added.) C.Cr.P. Art. 871. See also *State v. Burks*, 202 La. 167, 11 So.2d 518 (1943), wherein the Court recognized that a sentence ". . . is a judgment on conviction for crime." 11 So.2d at 520. If a district court has criminal jurisdiction at all over a criminal charge, it must, therefore, by the very nature and purpose of criminal proceedings, have jurisdiction to impose sentence upon conviction of that criminal charge. And as emphasized above, the criminal district court in this case, having jurisdiction over defendant for first degree murder, necessarily has jurisdiction to sentence him, in accordance with *Jenkins*, to the life sentence defined by *Jenkins* to be imposed upon a valid conviction of first degree murder, not second degree murder.

The criminal district court has jurisdiction over defendant on the criminal charge of first degree murder, a capital crime. Art. VII, Section 35, and Art. VII Section 52, 1921 La. Constitution; R.S. 13:1570; and Act 109 of 1973. First degree murder is a capital crime for purposes of jurisdiction over a juvenile more than 15 years old, even though *Roberts v. Louisiana*, 96 S.Ct. 3001 (1976) held that the statutory death penalty could not be applied procedurally to individual defendants in a constitutional manner under Louisiana's then existing statutory procedural scheme of imposing the sentence of death. There are two reasons or theories supporting this "capital crime" jurisdiction with respect to first degree murder: (1) *Roberts* struck down only the procedural manner of application of R.S. 14:30 (per Act 109 of 1973) to effect imposition of death sentences and left R.S. 14:30 (per Act 109 of 1973) itself in tact, leaving the statutory death penalty per se in tact, and (2) first degree murder, in any event, is a legislatively classified "capital crime," per *State v. Whatley*, 320 So.2d 123 (1975); *State v. Flood*, 269 So.2d 212 (1972); and *State v. Holmes*, 269 So.2d 207 (1972).

It is hornbook law that a statute can be valid in itself and only unconstitutional as applied to certain individual situations. The manner of application of valid statutes then is what is unconstitutional, not the statute itself. See, for example. *U.S. v. Rock Royal Co-op.*, 26 F. Supp. 534, modified 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446, rehearing denied 308 U.S. 631, 60 S.Ct. 66, 84 L.Ed. 526, and companion cases (1939); *Nashville, C. & St. L. Ry. v. Wallace, Comptroller of Treasury of Tennessee*, 288 U.S. 249, 53 S. Ct. 345, 77 L.Ed. 730 (1943); *Capooth v. U.S.*, 238 F. Supp. 583 (D.C. Tex., 1965); *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir, 1965); *Lovelace v. U.S.*, 357 F.2d 306 (5th Cir, 1966); *Bennett v. Cottingnam*, 290 F. Supp. 759 (D.C. Ala., 1968) aff'd 393 U.S. 317, 89 S. Ct. 554, 21 L.Ed. 2d 513; *Shuttlesworth v. Birmingham Board of Education*, 162 F. Supp. 372 (D. C. Ala.) aff'd 358 U.S. 101, 79 S. Ct. 221, 3 L.Ed. 2d 145 (1958); and *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (2nd Cir., 1967).

In *Roberts v. Louisiana*, 96 S.Ct. 3001 (1976), the U.S. Supreme Court did not strike down any provision itself of R.S. 14:30 (per Act 109 of 1973), including the death penalty provision thereof, but left same in tact; what the U.S. Supreme Court held unconstitutional in *Roberts* was the procedural manner of application of that death penalty provision to those individual defendants convicted and sentenced under Louisiana's then existing procedural system for imposing that death penalty

punishment. In this regard, *Woodson v. North Carolina*, 96 S.Ct. 2978 (1976) was decided as a companion case to *Roberts* and contained the detailed rationale behind both the *Woodson* and the *Roberts* decisions; in fact, the Court in *Roberts* continually referred to *Woodson* and expressly cited actual page references therefrom. In *Woodson*, the Court made it clear that it was the *manner of application* of the death penalty punishment provision of the North Carolina statute that was unconstitutional, not the statutory punishment provision itself. The Court said, in *Woodson*,

> "North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and *thus cannot be applied* consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.' " (Emphasis added.) 96 S.Ct. at 2990.

This is the exact same holding of *Roberts*.

In any event, under the legislative classification rationale of *State v. Whatley*, 320 So.2d 123 (1975); *State v. Flood*, 269 So.2d 212 (1972); and *State v. Holmes*, 269 So.2d 207 (1972), first degree murder continued to be classified as a "capital crime" for purposes of all legislative jurisdictional and procedural provisions. Hence, under Art. VII, Section 35, and Art, VII, Section 52, 1921 La. Constitution, and under R.S. 13:1570 (before Act 337 of 1975), criminal district court continues to have jurisdiction over this first degree murder case.

Defendent's contentions in his Motion To Be Discharged would have the legislative intent behind R.S.

13:1570 (before Act 337 of 1975) to mean that the Legislature intended the Louisiana Criminal Justice System to inflict death on juveniles and nothing else, to kill juveniles guilty of capital crimes or to let them go without any criminal consequences, to aim at death of juveniles or otherwise have no jurisdiction over them. No reasonable jurist could really believe that was the legislative intent of R.S. 13:1570 (before Act 337 of 1975). The true legislative intent, rather, was that criminal consequences were appropriate for juveniles over 15 years of age who would commit crimes so heinous and socially destructive by their nature as to be legislatively classified as "capital." The true intent then was aimed at the nature of the criminal activity itself and not at merely inflicting the death penalty. This intent is supported by the fact that, prior to *Furman*, criminal district courts continued to exercise jurisdiction over such juveniles even when they were found "guilty as charged without capital punishment."

Thus, the crime of first degree murder of which defendant herein was convicted is a "capital crime" over which criminal district courts have jurisdiction, and the life sentence defined in *Jenkins* to be *the sentence for first degree murder*, not for second degree murder, should be now imposed upon defendant herein.

The case of *State v. Smith*, Docket Number 58,170, decided Monday, November 8, 1976, comes to the same conclusion, is imminently correct, and analytically is on virtually "all fours" with the instant case. Both cases involved juveniles sixteen years old at the time of the offense; both cases involved first degree murder; in both

cases the offenses occurred before Act 337 of 1975 was enacted; and both cases even arose from the same judicial district. Defendant's brief in *Smith* even made much the same argument urged by defendant herein, as follows:

> "Additionally, the approach which the Court used in *Shaffer* and *Franklin* is not available because there is no other legally permissible penalty which can be imposed for the offense of first degree murder." Defendant Smith's Brief, pp. 57-58.

As pointed out hereinabove at the outset hereof, the premise of that argument is a false one, and the arguments based on it produce false conclusions.

The differences between *Smith* and the instant case are mostly superfluous and should not alter the results of either case. The offense in *Smith* occurred in St. John the Baptist Parish, while the one herein occurred in St. Charles Parish. The offense in *Smith* involved an attempted perpetration of armed robbery, while herein it involved a killing with intent to inflict great bodily harm on more than one person. *Smith* involved a caucasian defendant, while the instant case involved a Negro defendant. But none of these differences should provide a point of legal distinction for coming to a different result on the same issue of jurisdiction.

For all of the above reasons, as well as those expressed in appellee's Original Brief, defendant Tyler's first degree murder conviction should be upheld, and he should be sentenced accordingly. Defendant's Motion To Be Discharged From Custody, having no merit, should be overruled and dismissed.

III. Supplemental Reply to Defendant's Specification of Error Number 2

This Supplemental Brief will only briefly remind this Honorable Court that as recently as *State v. Skelton*, Docket Number 58,072, decided Thursday, October 14, 1976, this Honorable Court correctly reaffirmed the contemporaneous objection rule in that first degree murder case. Slip Opinion, pp. 3-4.

Because of the remarks aimed at R.S. 15:432 generally in the recent case of *State v. Searle*, Docket Number 57,262, decided, on rehearing, Wednesday, October 6, 1976, because of one possible interpretation extending *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), appellee would like merely to call this Honorable Court's attention to the case of *Evans v. State of Maryland*, 28 Md.App. 640, 349 A.2d 300 (1975). In that case, Judge Charles Moylan, a nationally recognized expert and scholar in the fields of criminal justice and constitutional law as applied to criminal justice, thoroughly analyzed the *Mullaney* decision in 54-page opinion. *Evans* interprets *Mullaney* as applying only to shifting of burden of proof to defendant type of cases but also held that presumptions *as to criminal consequences* (actual elements of the crime) were invalid, as opposed to "presumptions" which are really only statutorily recognized inferences of fact and which are valid, provided juries are allowed to consider evidence to the contrary, without a required burden-shift, as possibly rebutting same, and the statutory inference is "more likely than

not" applicable to the case. Pertinent from *Evans* here is the following:

> "Some mislabeled 'presumptions' have turned out, upon careful examination, to be nothing more than permitted inferences of fact. Some apologists generously have explained that the earlier use of the word 'presumption' was merely intended to connote a 'presumption of fact' (to wit, an inference), which was always to be distinguished from a true 'presumption of law.' When the due explanations have been made and the 'inference' drops down from the burden-shifting world of legally significant 'presumptions' to the more ordinary world of the inductive, reasoning process, what is the creature 'inference' that we are looking at?
>
> In a real sense, the whole decision-making process is the process of drawing inferences. From fact A, we infer fact B. From a confession, we infer guilt. From the pulling of a trigger, we infer an intent to harm. From the possession of recently stolen goods, we infer the theft. From the motive, we infer the criminal agency. From the presence of the sperm, we infer the penetration. From the muddy footprints on the living room rug, we infer the unlawful entry. The whole phenomenon of circumstantial evidence is the phenomenon of inferring facts in issue from facts established. The study of the process of drawing inferences is as much the field of the psychologist and the logician as it is the field of the reviewing judge. Yet certain inferences, out of the infinite swarm of their fellows, have been singled out for legal analysis. Why?
>
> It is difficult to say why certain of this infinite company of factual inductions have been marked for special scrutiny. It was most likely the accident of the fortune that caused some of the stronger and

> more frequently employed inferences to be elevated to the level of 'presumptions' in the first place and then, because some of that number were not sufficiently compelling to remain as true 'presumptions,' to drop back again to the world of ordinary inferences. It was probably this rise to and fall from prominence that marked them for special treatment by the courts.
>
> In any event, an inference comes to our attention in only two situations. When we are called upon to measure the legal sufficiency of evidence, we have to determine whether established facts A and B are legally sufficient to give rise to a fair inference of fact C, the ultimate fact in issue. We are similarly called upon to measure the efficacy of certain inferences when we are asked to instruct a jury that it may (although it need not) infer fact C from established facts A and B.
>
> (32, 33) Since an inference does not shift a burden either of persuasion or of going forward with evidence to a defendant, it does not come under the scrutiny of *Mullaney v. Wilbur*, in that regard. Since an illogical or improbable 'inference' would, however, unfairly relieve the State of part of its burden of proving every element of a case beyond a reasonable doubt, the inference, even as a mere inference, must pass constitutional muster under *United States v. Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965); *United States v. Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965), and *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). It must, therefore, be based upon a rational connection between the facts established and the fact to be inferred. Conversely, it 'must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can be said

with substantial assurance that the presumed fact (the inferred fact) is more likely than not to flow from the proved fact on which it is made to depend.' *Leary v. United States, supra*, at 89 S.Ct. 1548, cited in *Lindsay v. State, supra*, at 8 Md.App. 109, 258 A.2d 760." *Evans v. State of Maryland*, 349 A.2d at 338-339.

See also *State v. Lassley*, 218 Kan. 752, 545 P.2d 379 and 218 Kan. 758, 545 P.2d 383 (1976).

The presumption involved in the instant case was really a permissible inference of fact that one intends the natural and probable consequences of his acts. There was no charge to the jury that it was to be presumed that defendant acted with "malice aforethought" or with the intent "to kill or inflict great bodily harm" (the actual elements of the crime). The state was not relieved of its burden to prove the elements of the crime, and no burden was shifted to defendant in that regard. Moreover, the inference of fact that one intends the natural and probable consequences of his acts is virtually an altruism and can pass the "more likely than not" test under almost any circumstances. It certainly could do so under the circumstances of the instant case. Furthermore, even applying this statutory inference of fact to the case, the state still had the burden of proving beyond a reasonable doubt to the jury what were the natural and probable consequences of the acts proven, all by evidence of the totality of the circumstances. The jury found that criminal consequences were so proven, and appellate review extends only to a determination of whether there is *any evidence* to support such a jury's finding. There obviously is. The record is replete.

Hence, as to Specification of Error Number 2, C.Cr.P. Art. 841 prevents consideration of the merits or lack of merits of the alleged error. Nevertheless, the specification lacks substantive merit.

IV. Conclusion

Defendant Tyler had retained counsel at trial and again on appeal. He received a fair trial and was found guilty of first degree murder, a "capital crime," by a unanimous jury of reasonable, deliberate people, after hearing all the evidence presented at trial, both *pro* and *con*. Defendant's conviction for first degree murder should be upheld, and he should be sentenced to the life sentence defined by the *Jenkins* case to be now the sentence for first degree murder in the wake of the *Roberts* case. Defendant's Motion To Be Discharged From Custody is without merit and should be overruled and dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 1976, a copy of the foregoing brief was forwarded to Mr. Jack Peebles, attorney for defendant-appellant, 1006 Baronne Building, 305 Baronne Street, New Orleans, Louisiana 70112, by United States Mail, postage prepaid.

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